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JoEllen Lyons

West Virginia University College of Law

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STATE v. HICKMAN: AN ACCUSED'S RIGHT TO A THIRD PARTY ATTORNEY—LADY LUCK OR LADY LIBERTY?

I. INTRODUCTION

Twenty years ago, the United States Supreme Court answered the question of what procedures safeguard a criminal suspect's rights before and during interrogation. *Miranda v. Arizona*¹ elevated an individual's fifth amendment right against self-incrimination to include an accused's right to counsel. At the expense of reversing otherwise valid criminal convictions,² the Warren Court³ implemented *Miranda* as a stepping stone to constitutional liberty. However, the Court may not have embraced *Miranda*'s decisive role⁴ in a suspect's access to a third party attorney.⁵

In the years following the decision of *Miranda*, the trend of the Burger Court⁶ to retreat from the protections afforded by that case seemed to turn towards support of *Miranda*.⁷ However, *Miranda*'s increasing attacks from President Reagan's conservative bureaucracy have recently been heeded by the Supreme Court in the decision of *Moran v. Burbine*,⁸ while ignored by a majority of the states.⁹

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966): *Miranda* held that prior to any questioning, an individual taken into custody must be warned that (1) he has the right to remain silent; (2) anything he says can be used against him in a court of law; (3) he has the right to the presence of an attorney; and (4) if he cannot afford an attorney, one will be appointed for him prior to any questioning.

² Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 Loy. U. CHI. L.J. 405 (1982).

³ The Supreme Court under the leadership of Chief Justice Earl Warren from 1952 until his retirement in 1969.

⁴ Browning, *Moran v. Burbine: The Magic of Miranda*, 72 A.B.A.J. 59, 60 (Jan. 1986).

⁵ A third party attorney is one who has been retained or appointed by the defendant's family, the court, or anyone other than the actual defendant.

⁶ The Supreme Court under the leadership of Chief Justice Warren Burger from 1969 until 1986.

⁷ Sonenshein, *supra* note 2, at 408.

⁸ *Moran v. Burbine*, 106 S. Ct. 1135 (1986). A defendant, arrested for burglary, was questioned about a murder in another city. The police told a public defender, contacted by the defendant's sister, that no questioning would occur. The defendant, without knowledge of retained counsel's availability, executed a written waiver of his *Miranda* rights and signed three statements confessing to the murder. The trial court admitted the statements; the Supreme Court of Rhode Island affirmed his conviction; the United States District Court for the District of Rhode Island denied habeas corpus; and the United States Court of Appeals for the First Circuit reversed and granted the writ, holding that no valid waiver occurred. The United States Supreme Court reversed on certiorari, holding that the validity of the waiver was unaffected by the failure of the police to inform the defendant of counsel, the sixth amendment right to counsel had not yet attached, and police conduct did not violate fundamental fairness granted by due process.

⁹ *Id.* at 1144-45.

West Virginia, marshalling its judicial support behind the majority of states, mandates that a defendant cannot waive his fifth amendment right to counsel¹⁰ when law enforcement officials have knowledge of an attorney's retention or appointment in his behalf and do not inform him. Decided three months before the United States Supreme Court examined the issue, *State v. Hickman*¹¹ disallows interference between an attorney and an individual at the questioning stage, despite any exigency of the investigation.

While the defendant-minded may view the *Hickman* decision and its forerunners as bracing the aching arm of *Miranda*'s Lady Liberty, the United States Supreme Court's view of the right to a third party attorney looks more like Lady Luck: some defendants are blessed, and others are not.¹² In *Moran*, the United States Supreme Court refused suppression of a prearrest confession when police failed to inform an accused of a third party attorney's efforts to reach him. Despite pressure from many carefully reasoned state decisions, the Court believes that a "voluntary, knowing, and intelligent" waiver can exist without a third party attorney's presence or appraisal.¹³

Significantly, the *Hickman* decision places West Virginia among the majority of states which include third party attorneys in the fifth amendment right to counsel. This casenote will address the four differing views on expanding a defendant's rights, how West Virginia placed itself among the majority view, and the important distinctions between *Hickman* and the United States Supreme Court's opposing decision, *Moran*.

II. STATEMENT OF THE CASE

Antoine Hickman's argument with a woman at a bar in Charleston, West Virginia, culminated in a disturbance with other bar patrons outside the establishment. A witness, who watched Hickman enter a yellow Cadillac driven by another man, informed Charleston police. Two officers, in separate vehicles, searched for Hickman. One spotted the yellow Cadillac and flashed his lights until the car pulled over. The driver exited to talk to the police at the rear of his vehicle. After the driver stated that he had no part in the altercation that evening, but that Hickman may have been involved, one officer approached the passenger door and asked Hickman to get out. Hickman did not respond. The second officer then joined in the request, whereupon Hickman pulled a gun and killed them.

¹⁰ The fifth amendment right to counsel was an extension of the right against self-incrimination developed in *Miranda*.

¹¹ *State v. Hickman*, 338 S.E.2d 188 (W. Va. 1985).

¹² Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation?"*, *When Does it Matter?*, 67 GEO. L.J. 1, 94 (1978-79).

¹³ *Moran*, 106 S. Ct. at 1141 (citing *Johnson v. Zerbst*, 304 U.S. 458, 475, (1938)) (standard to judge a valid fifth amendment waiver), "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." *Id.*

Two arrest warrants against Hickman were issued the morning following the shootings. Subsequently, a meeting was arranged between Hickman's parents, a defense attorney, and the prosecuting attorney. Although the defense attorney never informed the state officials that he was the defendant's attorney and testified that he was hired by the defendant's family to assist the defendant in the preliminary aspects of the case, he attended the meeting to assure Hickman's peaceful arrest.¹⁴

One hour following the meeting, the police received a telephone call from a man who stated that Hickman was with him and wanted to turn himself in to the proper authorities. A detective drove to a prearranged meeting place, apprehended Hickman, and returned with him to the courthouse. After informing the prosecution of Hickman's apprehension, the detective read Hickman his rights in the presence of a police officer. Hickman initialed each right and then signed the waiver form. Following the waiver, the detective and the prosecution separately informed Hickman that his parents were in town. Hickman's response each time was that he did not want any help from his parents. He was then formally arrested by the police officer and again waived his *Miranda* rights in the same procedure as before. Following the second waiver, the prosecutor advised Hickman that his parents had contacted an attorney; Hickman indicated that he did not want aid from anyone.¹⁵

Hickman then confessed to the murders. He later repeated the confession. *Miranda* rights were issued for a third time, and a detective obtained a stenographer to record the statement. Hickman made a recorded confession and stated that, although he did not want to involve his parents, he was not told about the attorney.¹⁶ When the attorney arrived at police headquarters, the confession was being

¹⁴ The testimony of the defense attorney was:

I never went to Mr. Roark or talked with him in my office when he was there and specifically stated that I am representing Antoine Hickman in these two murder cases, because I consider the murder case as trial preparation and the trial of the cases, and I had not been retained by the family in that aspect of it. I was dealing with the preliminary aspects of it, of getting him into custody, and, at least my thinking process was to include the initial advice to the defendant once he was apprehended or had contacted me to give himself up.

Hickman, 338 S.E.2d at 191 n.2.

¹⁵ The prosecutor's remarks at the suppression hearing:

[A]fter Ivan Lee had placed him under arrest and advised him of his rights, I advised him, again, that I had met with his parents in a lawyer[s] office and that I didn't know whether or not that lawyer would represent him, but I asked him if he wanted me to try to contact that lawyer and have him present, and he indicated that he didn't want anybody present.

Q. You mean he said the words, 'I don't want anybody here, I don't want to talk to them.' He actually said the words?

A. He said, 'I don't want anybody here.'

Q. Those were the words he used?

A. That's right.

Id. at 192 n.3.

¹⁶ *Id.* at 192.

typed for Hickman's signature. After conferring with the attorney privately, Hickman told the prosecutor that he would not sign the statement. The defense attorney also asserted that he was not informed of Hickman's arrest by law enforcement officials but heard it from other sources.¹⁷

The circuit court convicted Hickman on two counts of first degree murder and sentenced him to two consecutive terms of life without mercy. On appeal, the West Virginia Supreme Court of Appeals affirmed the judgment despite the defendant raising three assignments of error. In arguing the inadmissibility of his confessions, Hickman contended he was not informed of the third party attorney's retention and was too intoxicated at the time of his confession to voluntarily waive his rights. The defendant also asserted that he was not promptly presented before a magistrate as required by section 62-1-5 of the West Virginia Code.¹⁸ The supreme court decided that Hickman had validly waived his fifth amendment right to counsel. Although not specifically analyzed within this casenote, the court also held that Hickman's intoxication had no bearing on the voluntariness of his waiver, nor did it serve as a defense to premeditation.¹⁹ On the issue of prompt presentment, the court refused to render Hickman's confessions inadmissible when the state delayed presenting him before a magistrate because they were trying to obtain a confession.²⁰ The confession was obtained prior to the court establishing this rule of law, and retroactivity was denied.²¹

III. PRIOR LAW

A. *Miranda v. Arizona and Its Progeny*

Beginning in the 1930s, police brutality and physical coercion developed into the modern practice of psychological, custodial interrogation. Since the secrecy of "incommunicado" interrogations crippled our knowledge of exact procedures used by police, an examination of police manuals, texts from law enforcement agencies, and documented procedure books evidenced the typical custodial interrogation²²—a "how-to" on creating an environment designed to break down a defendant's resistance to confession.²³ In response to the lonely defendant's interrogative outcries came *Miranda*.

¹⁷ *Id.* at 193.

¹⁸ W. VA. CODE § 62-1-5 (1984).

¹⁹ *Hickman*, 338 S.E.2d at 200-02.

²⁰ *State v. Persinger*, 286 S.E.2d 261 (W. Va. 1982) (Held: The delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant).

²¹ *Hickman*, 338 S.E.2d at 199-200.

²² *Miranda*, 384 U.S. at 446-58.

²³ *Id.* at 447, 450.

In *Miranda*, the United States Supreme Court was adamant in its disapproval of the purposes and methods of police interrogation in America.²⁴ Conceptually, it required a voluntary confession.²⁵ Theoretically, that confession must also be the product of a "knowledgeable and intelligent" choice. *Miranda's* progeny consists of various definitions of the waiver threshold, and some consistency results. Inarguably, it is the defendant's stringent right to have an attorney present if he so requests.²⁶ The Supreme Court warned:

The denial of the defendant's request for his attorney undermines his ability to exercise a privilege—to remain silent if he chooses or to speak without any intimidation, blatant or subtle. The presence of counsel, in all cases before us, today would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.²⁷

Miranda reasserted a standard outlined in *Escobedo v. Illinois*²⁸ that, unless a valid waiver occurs, or if interrogation continues in the absence of counsel and a statement results, there is a heavy burden on the state to prove the defendant knowingly, intelligently, and voluntarily waived his privilege against self-incrimination and the right to counsel.²⁹ Although protections are evident when one requests an attorney, rights differ when third parties are involved.

²⁴ *Id.* at 457.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our nation's most cherished principles—that an individual may not be compelled to incriminate himself unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Id. at 457-58.

²⁵ *Id.* at 465. "Voluntariness is undermined by all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free choice." *Id.* at 462 (citing *Bram v. United States*, 168 U.S. 532, (1897)):

Voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers while in custody and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.

Id.

²⁶ *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

²⁷ *Miranda*, 384 U.S. at 466.

²⁸ *Escobedo v. Illinois*, 378 U.S. 478, 490, n.14 (1963).

²⁹ *Brewer v. Williams*, 430 U.S. 387 (1976).

In the years following *Miranda*, a series of cases dealt with determining the exact moment that the rights attach. Courts jostled the meanings of "custody" and "interrogation" until some congruency evolved. In 1969, a broadening of the territory for an interrogation brought those occurring outside the police station under the shelter of *Miranda*.³⁰ Then, in 1980, custodial interrogation was labeled as "express questioning or its functional equivalent,"³¹ clearly a switch from the original closed-door, incommunicado scenario painted by the Court.

In response to those broadening definitions from 1969 to 1980, police officers and law enforcement officials reacted by dispensing *Miranda* rights immediately when a suspect was questioned. It was not until 1984 that a court found exception to mandatory *Miranda* recitation in cases of public safety.³²

B. West Virginia Law

The West Virginia Supreme Court of Appeals' decision in *State v. Weyer*³³ distinguished the fifth and sixth amendment rights to counsel. The court emphasized that *Miranda* required an accused to be advised of his right to have counsel present during interrogation under the fifth amendment. The sixth amendment right to counsel means a defendant is entitled to have the help of a lawyer at or after the time judicial proceedings have been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."³⁴

In discussing the weight given to the sixth amendment right to counsel, the court found that, although there was no per se rule against waiver of that right, waiver of the sixth amendment right is judged by stricter standards than waiver of a fifth amendment right to counsel.³⁵ To validly waive a sixth amendment right to counsel, there must be a written waiver signed by the defendant; the defendant must be aware he was under arrest and informed of the nature of the charge against him; and the defendant must receive the customary *Miranda* warnings.³⁶ The fifth amendment right to counsel waiver requires that a defendant be warned of his right against self-incrimination and right to an attorney during interrogation.³⁷

Additionally, because these waivers are based upon fundamental constitutional rights, courts will "indulge every reasonable presumption against waiver . . . and will not presume acquiescence in the loss of such fundamental right."³⁸ Since this

³⁰ *Orozco v. Texas*, 394 U.S. 324 (1969).

³¹ *Rhode Island v. Innis*, 446 U.S. 291 (1980).

³² *New York v. Quarles*, 467 U.S. 649 (1984) (police officers can investigate suspects without giving the *Miranda* warnings when the officers are prompted by a concern for public safety).

³³ *State v. Weyer*, 320 S.E.2d 92 (W. Va. 1984).

³⁴ *Id.* at 100-01. See also *State v. Gravely*, 299 S.E.2d 375 (W. Va. 1982).

³⁵ *Id.* at 103.

³⁶ *Id.* at 105.

³⁷ *Id.* at 100.

³⁸ *State ex rel. Browning v. Boles*, 149 W. Va. 181, 139 S.E.2d 263, 264 (1964) (Syl. pt. 2)(quoting *state ex rel. May v. Boles*, 149 W. Va. 155, 139 S.E.2d 177, 178 (1964) (Syl. pt. 3)).

right is of such highly regarded constitutional dimensions, West Virginia has adopted in *State v. McNeal*³⁹ that the burden to prove the validity of a waiver of a right to counsel is upon the state, not the defendant.⁴⁰ For the state to effectively prove a valid waiver occurred, it must show that waiver of counsel was not only voluntary, but also constitutes a knowing and intelligent relinquishment or abandonment of a known right or privilege.⁴¹

IV. FOUR VIEWS ON THIRD PARTY ATTORNEYS

A. *The New York Rule*⁴²

In a radical commitment to fuel the fires of criminal suspect protectionism ignited by the Warren Court,⁴³ the New York Court of Appeals ruled that once the police know or have been apprised of the fact that the suspect is represented by counsel, or any communication has been received for the purpose of representing the accused, his right to counsel attaches.⁴⁴ The New York rule is based on the fifth and sixth amendments, prior case law, and the state constitution.⁴⁵ The right does not depend on an attorney's formal retainer⁴⁶ and may be activated for any

³⁹ *State v. McNeal*, 162 W. Va. 550, 555, 251 S.E.2d 484, 487 (1978).

⁴⁰ *Id.* (citing *Brewer*, 430 U.S. at 404).

[I]n determining the question of waiver as a matter of federal constitutional law . . . it was incumbent upon the state to prove 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. at 464. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant . . . and that courts indulge in every reasonable presumption against waiver . . . This strict standard applies equally to an alleged waiver of the right to counsel, whether at trial or at a critical stage of pretrial proceedings.

Brewer, 430 U.S. at 404 (citations omitted).

⁴¹ *Wyer*, 320 S.E.2d at 103.

⁴² The New York rule originated in *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963); was further defined in *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); and extended New York constitutional privileges in *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). Because discussion of these three primary cases occurs in reference to the New York rule, it is sometimes referred to as the *Donovan-Arthur-Hobson* rule. Since *Donovan* was decided prior to the *Miranda* decision, most authorities prefer citing *Arthur*.

⁴³ Kamisar, *supra* note 12, at 94-95.

⁴⁴ *Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663. The defendant was arrested and immediately confessed to throwing his two-year-old son into a river. He was placed in a police car, brought to headquarters, and questioned. Upon hearing a television news broadcast about the incident, an attorney, who had previously represented the defendant, went to the police station. He eventually saw the defendant, who was visibly intoxicated and sick. He told the police to leave the man alone. The following morning, in the absence of an attorney, incriminating statements were made and used later to obtain a second degree murder conviction. Judgment was reversed because, once the attorney notified the police of his involvement, no waiver would be validly made in his absence.

⁴⁵ *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 84.

⁴⁶ *Arthur*, 22 N.Y.2d at 328, 239 N.E.2d at 538, 292 N.Y.S.2d at 665.

suspect by any attorney. Also, it is unnecessary for the attorney to be physically present to notify police of his involvement in a case.⁴⁷

B. The Majority Rule

While New York requires that no waiver is valid without the presence of a third party attorney, the majority of states profess a more subtle opinion.⁴⁸ In addition to receiving *Miranda* rights, a defendant who is held for custodial interrogation must be informed of an attorney's retention or appointment.⁴⁹

The majority rule, as in New York, finds its philosophy in *Miranda*. While *Miranda* provides that a suspect's rights can be waived, there is still a "heavy burden" against proving the validity of that waiver.⁵⁰ The linchpin for both rules is how the court interprets the three-prong waiver standard as announced in *Johnson v. Zerbst*.⁵¹ For this line of cases, interpretation does not rest on a definition of "voluntary" but depends on the scope used to define "knowledge and intelligence." While a defendant may "generally" be able to knowingly and intelligently waive his right to counsel, once a "specific" attorney becomes available for that "specific" defendant, the majority suggests that knowledge of that attorney's accessibility is imperative to effectuate a valid waiver.⁵²

The Delaware court has articulated a well-stated view of the majority opinion:

When a suspect does not know that an attorney, who has been retained or properly designated to represent him, is actually present in the police station seeking an opportunity to render legal assistance, and the police do not inform him of that fact, there can be no intelligent and knowing waiver. The *Miranda* warnings indicate to the suspect an abstract right to counsel, and the waiver of the right only means that for the moment the suspect is foregoing the exercise of that conceptual privilege. But that is clearly distinct from the opportunity to confer with a specifically retained or designated attorney who is actually present, seeking to render legal assistance. We cannot, and do not, conclude that a suspect, who is indifferent to the usual abstract offer of counsel, recited as part of the warnings required by *Miranda*, will disdain a chance to consult a lawyer waiting to see him then and there.⁵³

Proponents of the majority discount *Miranda* by labeling its offer of counsel as an "abstract right of a conceptual privilege."⁵⁴ Their logic dictates that knowledge

⁴⁷ *People v. Gunner*, 15 N.Y.2d 226, 232, 205 N.E.2d 852, 855, 257 N.Y.S.2d 924, 928 (1965).

⁴⁸ *Moran*, 106 S. Ct. at 1151, n.10 (the American Bar Association's summarization of the majority of states' conclusions).

⁴⁹ *Hickman*, 338 S.E.2d at 194.

⁵⁰ *Miranda*, 384 U.S. at 475.

⁵¹ See note 13.

⁵² *Weber v. State*, 457 A.2d 674 (Del. Super. Ct. 1983).

⁵³ *Id.* at 685.

⁵⁴ *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).

necessary for waiver only occurs when that right becomes tangible or attainable to a defendant.⁵⁵

C. *Two Minorities: "Rejection of the Majority" and "the Totality of Circumstances"*

Several jurisdictions have refused to require the discovery of a third party attorney for voluntarily, knowingly, and intelligently waiving the fifth amendment right to counsel.⁵⁶ In *Blanks v. State*, the Georgia Supreme Court criticized the New York rule and its variants:⁵⁷ "[w]hatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'springs' to the telephone hardly seems a rational way of reconciling the interests of the accused with those of society."⁵⁸ Thus, one minority of states visualizes a problem with the sufficiency of *Miranda*, yet they would rather affirm a rule of law which would be applied fairly to all defendants. According to the minority, the majority rule benefits only those with the measures to obtain a third party attorney; the New York rule blatantly favors "speedy counsel."⁵⁹

The Supreme Court's *Moran* decision may have borrowed some likeness from an even lesser minority: the totality of circumstances. Rather than give a definition to what constitutes a "knowing and intelligent" waiver, this position prefers to test the waiver upon the particular facts and circumstances surrounding that case, including the background, experience, and the conduct of the accused.⁶⁰ *Moran* affirmed the Rhode Island Supreme Court's interpretation of *Miranda*, which places

⁵⁵ *Id.* at 278; *Weber*, 457 A.2d at 685.

⁵⁶ *Blanks v. State*, 254 Ga. 420, 330 S.E.2d 575 (1985), *cert. denied*, 106 S. Ct. 1479 (1986); *State v. Blanford*, 306 N.W.2d 93 (Iowa 1981); *State v. Burbine*, 451 A.2d 22 (R.I. 1982) (*Burbine* was overturned in a habeas corpus proceeding); *Burbine v. Moran*, 573 F.2d 178 (1st Cir. 1985), *rev'd* 106 S. Ct. 1135 (1986).

⁵⁷ *Hickman*, 338 S.E.2d at 194. "Some courts incorrectly have characterized the majority view we have adopted as a variation of the restrictive New York Rule, but we disagree." *Id.*

⁵⁸ *Kamisar*, *supra* note 12, at 95.

⁵⁹ *Blanks*, 254 Ga. at 423, 330 S.E.2d at 579:

If *Miranda* warnings are insufficient to protect fifth amendment rights, this insufficiency can be better addressed than by a rule which would only protect those with the money and connections to 'bring a lawyer swiftly into the fray' and 'which would seem to favor the professional criminal most of all.'

⁶⁰ *State v. Beck*, 687 S.W.2d 155 (Mo. 1985), *cert. denied*, 106 S. Ct. 2245 (1986) (*en banc*) (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting with approval, *Johnson*, 304 U.S. at 458)). The defendant was not informed by police that an attorney was trying to contact him, yet a valid waiver existed after examining the background, experience and conduct of the accused. He told his mother to obtain counsel for him several days prior to his arrest. The court found this indicative of the defendant's understanding of his right to counsel.

the assertion of individual fifth amendment rights in the defendant's hands.⁶¹ The Court mandated a two-part test: while one prong of the Court's agreement is with the first minority—knowledge necessary for waiver is not dependent on activities occurring outside of the suspect's presence, prong two reiterates the totality of circumstances test—the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of circumstances surrounding interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."⁶²

Although the four views differ in result, each is trying to meet the difficult challenge of dealing with third party attorneys. On a case-by-case basis, each court has to deal with several parties: the defendant, the attorney, law enforcement officials, and a third party obtaining the attorney. Because the fact situations change so diversely, it complicates implementation of a bright-line rule. Most often, the problem occurs when the attorney's retention is withheld accidentally or intentionally by police officials, and it is usually their role which is scrutinized by most courts.⁶³

V. CASE ANALYSIS

State v. Hickman is a case of first impression for the West Virginia Supreme Court of Appeals⁶⁴ and an extension of prior law. In adopting the majority viewpoint, the court found that withholding the availability of a "specific" attorney not only results in an invalid waiver of *Miranda* rights, but also encourages deception by law enforcement and attacks *Miranda* at its foundation.⁶⁵

A. Rejection and Criticisms of the New York Rule

By interpreting a culmination of holdings in *State v. Wyer*,⁶⁶ the New York rule was regarded as previously rejected. *Wyer* distinguished the sixth amendment

⁶¹ *Burbine*, 451 A.2d at 28:

[W]e are of the opinion that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys.

Id.

⁶² *Moran*, 106 S. Ct. at 1141.

⁶³ *Hickman*, 338 S.E.2d at 193-95.

⁶⁴ *Id.* at 188.

⁶⁵ *Id.* at 194-95.

⁶⁶ *Wyer*, 320 S.E.2d 92.

right to counsel,⁶⁷ which arises at the commencement of adversarial proceedings, from the fifth amendment right.⁶⁸ While *Wyer*⁶⁹ dealt with the sixth amendment right to counsel, the court extended its holding to encompass the fifth amendment waiver in *Hickman* on the basis that West Virginia grants no per se rule against a waiver of the sixth amendment right to counsel. Additionally, the waiver of a sixth amendment right to counsel is judged by stricter standards than a waiver of the fifth.⁷⁰ For one to waive that sixth amendment right, he or she must receive *Miranda* rights, be informed of the nature of the charge, and execute a written waiver.⁷¹ Since *Wyer* did not require the presence of an attorney to execute the more stringent sixth amendment waiver, the court determined that *Wyer* rejected the New York rule, which is based on the right to counsel under both the fifth and sixth amendments.⁷²

West Virginia not only rejects the New York rule, it declines to title its decision as a variant of that rule. However, the court centered on the requirement of “voluntarily and intelligently” effectuating a waiver. Realizing the heavy burden of proof that the state has in proving the validity of the waiver, the court focused on Hickman’s voluntary custody and execution of three written waivers of his *Miranda* rights.⁷³ Paramount to the written waivers, Hickman was apprised that his family was in town and had contacted an attorney on his behalf. He rejected the invitation to speak with counsel and, therefore, voluntarily and intelligently waived his fifth amendment rights.⁷⁴ Hickman’s waiver, in substance, would have

⁶⁷ *Hickman*, 338 S.E.2d at 195:

‘Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—whether by way of formal charge, preliminary hearing, indictment, information or arraignment. [*Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882, 32 L.Ed.2d 411 (1972)].’

Id. (quoting *Brewer*, 430 U.S. at 398).

⁶⁸ *Wyer*, 320 S.E.2d at 102 (citing *Edwards*, 451 U.S. 470). The fifth amendment right to counsel was created in *Miranda* as an adjunct to the defendant’s right against self-incrimination. This fifth amendment right to counsel is triggered when a defendant is taken into custody by law enforcement officials.

⁶⁹ Kenneth Wyer was brought before a magistrate following his arrest and requested that counsel be appointed for him. The following day he confessed to first degree sexual assault. Since his sixth amendment right to counsel attached when the defendant was arrested, brought before the magistrate, and requested counsel, the court required an *in camera* hearing to determine if the defendant executed a written waiver, if the defendant was aware that he was under arrest and apprised of the nature of the charge, if he received his *Miranda* warnings, if he had shown a desire to have counsel, and whether he had initiated further conversation with police evidencing his desire to waive his sixth amendment right.

⁷⁰ *Wyer*, 320 S.E.2d at 104-05.

⁷¹ *Id.* at 105.

⁷² *Hickman*, 338 S.E.2d at 196.

⁷³ *Id.* at 195-96.

⁷⁴ *Id.* at 196.

qualified as a sixth amendment waiver as well. Adjudged by the more liberal standards applied to a fifth amendment waiver, Hickman secured both requirements of a written waiver and instruction on the nature of his arrest.⁷⁵

Hickman is in unison with the majority of states, but criticism of both the majority and the New York rule may shadow ineffectiveness under equal protection. Hickman's fifth amendment waiver survived judicial scrutiny because he was apprised of a third party attorney's involvement.⁷⁶ Hickman was among the privileged few to whom the information was not withheld.⁷⁷ While the New York rule is an unconfined right to have an attorney present to institute a waiver once counsel is available, in practice it may become a race to the police precinct by third party attorneys.⁷⁸

In the *Gunner* and *Arthur* cases, the New York Court of Appeals refused to confine *Donovan* to its facts and emphasized the 'mechanical and arbitrary' nature of a rule that would turn on 'the existence of a formal retainer' or whether an attorney 'presents himself at the place where the suspect is in custody and expressly requests the opportunity to consult with him.' Consequently, all an attorney needs to do to invoke *Donovan* [the New York rule] is to apprise the police that he has entered the proceeding.⁷⁹

The New York rule has been criticized. The rule can be activated arbitrarily by a family member retaining an attorney⁸⁰ or an attorney learning of the arrest of a former client, with or without the defendant's knowledge or request.⁸¹ The rule then favors suspects who have either the luck or ability, be it financial or otherwise, to have "a specific" attorney immediately available. In an arena where equal protection inspired protection for the poor and uneducated,⁸² the New York rule may well disaffirm equal protection for *all* criminal suspects.⁸³

⁷⁵ *Id.*, n.10.

⁷⁶ *Id.*

⁷⁷ *People v. Harris*, 703 P.2d 667 (Colo. Ct. App. 1985); *Weber*, 457 A.2d 674; *People v. Smith*, 93 Ill. 2d 179, 442 N.E.2d 1325 (1982), *cert. denied*, 461 U.S. 937 (1983); *State v. Mathews*, 408 So. 2d 1274 (La. 1982); *Lodowske v. State*, 302 Md. 691, 490 A.2d 1228 (1985), *vacated*, 106 S. Ct. 1452 (1986); *Elfadl v. State*, 61 Md. App. 132, 485 A.2d 275 (1985), *cert. denied*, 106 S. Ct. 1457 (1986).

⁷⁸ *Kamisar*, *supra* note 12, at 95.

⁷⁹ *Id.* at 94-95.

⁸⁰ *People v. Pinzan*, 44 N.Y.2d 458, 462, 377 N.E.2d 721, 723, 406 N.Y.S.2d 268, 269-70 (1978).

⁸¹ *Arthur*, 22 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419.

⁸² *Miranda* was also decided under the fourteenth amendment and includes the right to have an attorney appointed if one cannot afford an attorney.

⁸³ *Kamisar*, *supra* note 12, at 95:

There is not even a weak congruence—indeed, there is no congruence at all—between a defense lawyer's entry into the proceeding and a suspect's need for a lawyer's help or the government's need for evidence. Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'springs to the telephone hardly seems a rational way of reconciling the interests of the accused with those of society.'

Id.

B. Criticisms of the Majority Rule: The United States Supreme Court in Moran v. Burbine

The most well-founded criticism of the majority rule has been enunciated by the United States Supreme Court in *Moran v. Burbine*.⁸⁴ Although *Moran* weighed the majority viewpoint, its rejection of that view also centered on the three dimensions covered by a valid waiver. By the Court's breakdown of a "voluntary, knowing and intelligent waiver," it devised a rule of law. For a waiver to be "voluntary," "the relinquishment of the right must be . . . in the sense that it was a product of a free and deliberate choice rather than intimidation, coercion, or deception."⁸⁵ The Court also used the totality test.⁸⁶

Applying this two-part test, the Supreme Court determined that knowledge necessary for waiver is not dependent on activities occurring outside the presence of the suspect. Although additional information may affect a suspect's decision to confess, the Constitution does not guarantee a right to nonconfession.⁸⁷

Moran's placement among the minority position was in part premised on practical considerations.⁸⁸ A point that *Hickman*, the majority, and the New York rule do not discuss is the applicability of their rules. Although it has had its shortcomings, *Miranda* has been a clear-cut rule to apply. It undermines the specificity of procedural safeguards to add an additional, undefined burden on police beyond *Miranda*. As the Supreme Court points out, the two concerns balanced are "the need for police questioning as a tool for effective enforcement of criminal laws" and the control of an "interrogation process [which is] 'inherently coercive.'"⁸⁹

Protection of an individual from coercion is mandated. *Miranda* and its progeny afford some protection, but now some realistic assessment of the importance of investigatory efforts must be made. Must we dissuade confessions and end investigatory processes, or is the traditional allotment of *Miranda* warnings enough? The suspect can end interrogation by not waiving his right to counsel under *Miranda*, and the courts' concern of forcing police officials "to keep the suspect abreast of the status of his legal representation" may be too much.⁹⁰

C. Hickman: A Nationally Supported Majority

The majority's broad adoption across the country causes one to reflect on the Supreme Court's conclusion that a widely implemented decision is impractical. As pointed out in the *Moran* dissent by Justice Stevens, "[o]urs is an 'accusatorial'

⁸⁴ *Moran*, 106 S. Ct. 1135.

⁸⁵ *Id.* at 1141.

⁸⁶ *Id.* at 1151 n.10.

⁸⁷ *Moran*, 106 S. Ct. at 1141.

⁸⁸ *Id.* at 1143.

⁸⁹ *Id.* at 1144.

⁹⁰ *Id.* at 1145.

and not 'inquisitorial' system."⁹¹ While our system is based on the accuser carrying the burden of proof, it seems that "confession" is not a protected right or privilege of the state. Furthermore, *Hickman* correctly interprets the historical role our system plays in investigation by affording greater weight to the individual or suspect. Countering this is society's substantial interest in apprehending, prosecuting, and punishing criminals. After all, was *Miranda* not premised on the deep concern over "incommunicado questioning"?⁹²

The third party attorney issue is not always as clear-cut factually as *Hickman* depicts. Mr. Hickman was found to have been informed of his third party attorney. The more difficult issue arises when deception is used by police. The United States Supreme Court's position requires no disclosure of third party attorney contact, whether it be accidental or intentional on the part of police officials.⁹³ While "accidents" must be expected on occasion, the most deeply disturbing aspect of the minority position is its implementation in instances where police deception is clear.⁹⁴

Miranda, with all of its shortcomings, still provides a discernable legacy that "the privilege against self-incrimination will only be honored in the official interrogation setting where *police* and judges operate within clearly delineated guidelines."⁹⁵ If, as the minority suggests, blatant deception is forged with accidental deception and unifiedly ignored, have we not reaffirmed *Miranda*'s theme? "Abuse of authority thrives on discretion."⁹⁶

As suggested by the *Hickman* holding, rather than distinguishing cases on police honesty, courts should focus centralize on the defendant's knowledge.

VI. CONCLUSION

State v. Hickman aligns West Virginia with the majority of states by requiring that information about third party attorneys be made available to a defendant. Without this information, knowledge necessary to implement a valid fifth amendment right to counsel waiver is missing.

Although the United States Supreme Court has decided differently, *Hickman* and its predecessors meet constitutional muster, inasmuch as the states are only required to give no less rights than those mandated by the Supreme Court. *Hickman* stands among a strong majority of states and political forces who are concerned that *Miranda* has simply become "magic language" which once invoked means a

⁹¹ *Id.* at 1148 (Stevens, Brennan, Marshall, JJ., dissenting) (quoting *Miller v. Fenton*, 106 S. Ct. 445 (1985)).

⁹² *Miranda*, 384 U.S. 436.

⁹³ *Moran*, 105 S. Ct. 1135.

⁹⁴ Sonenshein, *supra* note 2, at 462.

⁹⁵ *Id.*

⁹⁶ *Id.*

defendant is protected.⁹⁷ In essence, proponents of the majority have updated the incommunicado atmosphere, which inspired *Miranda*, and professed: "[y]ou can't just take the defendant off the streets and keep him away from everybody."⁹⁸

States, including West Virginia, will now have to answer many questions arising from the adoption of the majority view. When does a lawyer have a legitimate, and ethical interest in the suspect? Has the interest been expressed properly? What time restraints are required of an offer of counsel? Who in police enforcement is responsible for the correctness and promptness of information given to a defendant?⁹⁹

Foreseeably, preceptive lawyering in West Virginia could depend upon how fast an attorney is brought on the scene.¹⁰⁰ Although speculations about the decision's implementation may look worrisome, at least some attempt is being made by the majority to cross a river which *Miranda* has left bridgeless.

JoEllen Lyons

⁹⁷ Browning, *supra* note 4, at 59. In Rhode Island's argument to the United States Supreme Court, thirteen lawyers for the Attorney General of Rhode Island and the Rhode Island Office of the Public Defender, joined by amici curiae briefs from the Department of Justice, the International Association of Chiefs of Police, Americans for Effective Law Enforcement, the Legal Foundation of America, the National District Attorneys Association and Attorney Generals from 30 states and two United States territories, supported the "minority" position, while the National Legal Aid and Defender Association, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the Association of Trial Lawyers of America, and the American Bar Association supported the "majority" viewpoint.

⁹⁸ Browning, *supra* note 4 at 59.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 61.